82-5179

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SUPREME COURT, U.S.

NO. A-982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1982

DEV KINNEY D/B/A MEDIA GRAPHICS
Appellant, Defendant, CounterPlaintiff

V.

KOTLER EXTERMINATING COMPANY, INC.
Appellee, Plaintiff, CounterDefendant

APPELLEE'S MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF TENNESSEE

DAVID E. CAYWOOD
PICARD, CAYWOOD, ARTHUR & TAYLOR
Suite 2800, Sterick Building
Memphis, Tennessee 38103
Attorneys for Appellee,
Kotler Exterminating Co., Inc.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF TENNESSEE

MOTION TO DISMISS

Appellee, Kotler Exterminating Co., Inc., pursuant to United States Supreme Court Rule 16.1(b),(d), 28 U.S.C., moves the Court to dismiss the Appeal herein on the following grounds:

1. The appeal does not present a substantial federal question.

2. The federal question sought to be reviewed was neither timely nor properly raised, nor expressly passed on by the Courts of the State of Tennessee.

3. The judgment of the Court of Appeals, Western Section at Jackson and the Supreme Court of the State of Tennessee rests on an adequate non-federal basis.

4. The appeal in forma pauperis is frivolous or malicious, pursuant to 28 U.S.C. 1915 (d).

STATEMENT

This suit was brought by Kotler for return of $2,000.00 paid in advance for work to be done by Kinney pursuant to terms of a contract entered into by the parties, and for $25,000.00 damages for breach of said contract.

By counter-suit Kinney sought judgment against Kotler for $2,665.50 for work done, plus attorney's fees and damages of $60,000.00.

The case was tried before the Honorable Irving M. Strauch in the Circuit Court of Tennessee for the Fifteenth Judicial Circuit at Memphis and a jury, resulting in a verdict and judgment in favor of Kotler for $2,600.00 and against Kinney in both the suit and counter-cuit. From the verdict and judgment, Kinney appealed after his Motion for a New Trial was overruled.

ISSUES APPEALLED TO TENNESSEE COURT OF APPEALS

On appeal to the Court of Appeals of Tennessee, Western Section at Jackson, Kinney raised the following issues:

> "1. Whether the verdicts of the jury in the suit and counter-suit were supported by the evidence.
> 2. Whether the Court erred in not permitting Defendant/Counter-Plaintiff (Kinney) to present material evidence as to the meaning or understanding upon which the contract was based.
> 3. Whether the Court erred in not permitting Defendant/Counter-Plaintiff (Kinney) to material evidence of fraud and delay on t of Plaintiff/Counter-Defendant.
> 4. Whether the Court erred in instructing the jur that Defendant/Counter-Plaintiff (Kinney) pled at time was not of the essence.

The Tennessee Court of Appeals affirmed the judgment of Trial Court on all issues on November 30, 1981.

On Appeal to the Supreme Court of Tennessee at Jac ., Kinney raised the identical issues reviewed in the Court of Appeals. Upon consideration of the Application for Permission to Appeal of Kinney, the Answer of Kotler, the opinion of the Court of Appeals and the record in the cause, [on Febru 16, 1982] the Supreme Court of Tennessee in a Per Curiam opinion denied permission to appeal.

QUESTIONS PRESENTED

Whether a State Court of Appeals is bound to uphold a jury verdict resulting from deliberate tort by a municipality within that state, quoting U.S. Constitutional Amendments V and XIV due process clauses. (Emphasis added.)

ARGUMENT

Appellant, Kinney first raises the question presented above in his appeal to the Supreme Court of the United States. He did not raise this issue in the Tennessee Court of Appeals nor in the Supreme Court of Tennessee; thus, the issue was not expressly passed on due to Kinney's failure to properly and timely raise the issue. Therefore, U.S. Supreme Court Rule 16. 1 (b), 28 U.S.C. is applicable and Kotler asks for dismissal on this ground.

In his jurisdictional statement to this Court, Kinney cites Articles V and XIV of the United States Constitution for the first time in this cause. At no time prior to this did Kinney raise these issues. As stated above, the questions on appeal in the Tennessee Court of Appeals and the Supreme Court of Tennessee involved presentment and support of evidence and jury instructions, all of which the Courts below resolved in favor of Kotler. Kinney has here for the first time raised a different issue regarding a deliberate tort by a municipality which never came up at trial or on appeal to the States Courts. At page 4 of his jurisdictional statement to the Court, Kinney states that in a Memorandum filed January 30, 1982 (attached) he "again raised the federal question of due process of law." The text of the Memorandum admits that only after trial did his attorney withdraw from the case. Therefore the only possible due process issue -right to counsel- is satisfied. The only other issues raised in this memo are judicial error questions which were sufficiently resolved by the Appellate Courts below. Thus, it is evident that Kinney has only raised Articles V and XIV of the United States Constitution issues in order to satisfy the jurisdictional statement requirements of U.S. Supreme Court Rules 15.1 (e) (iii), and (f). An Order to Dismiss is proper under these circumstances.

In addition to the reasoning that Kinney only raised questions of evidence and jury instruction below, Kotler further relies on U.S. Supreme Court Rules 16.1 (b) that the Court may dismiss on grounds that the judgment rests on an adequate non-federal basis.

As to issue number one (1), "whether there was evidence to support the Jury Verdict," the Court of Appeals held that "where there is no error of law, we cannot disturb the verdict if there is any material evidence to support it," citing City of Columbia v. Lentz, 39 Tenn. App. 350, 282

S.W.2d 787; also Rose Co. v. Snyder, 185 Tenn. 499, 206 S.W.2d 897 and stating there were many cases in support.

In its ruling on issue number two (2), "whether the Trial Judge erred in not permitting Kinney to present evidence as to the meaning or understanding upon which the contract was based," the Court of Appeals held the law is well settled in Tennessee that unless the language of the written agreement is ambiguous, testimony may not be introduced to change, explain or vary the terms thereof. The Court went on to state that the contract involved in the case is expressed in plain and unambiguous language and the Court found no error in the action of the Trial Court with respect to this issue.

The Court found that issue number three (3), "whether the Trial Judge was in error in not permitting Defendant to introduce proof of fraud and delay on the part of Kotler," was thoroughly explored at the trial by Kinney's own testimony and one of his witnesses. The Court held that Kotler's responsibilities were set forth in the written agreement, and the attempt by Kinney to go outside the contract and impose duties on Kotler not imposed by the agreement were properly denied by the Trial Court and the Court of Appeals, therefore, found no error as to issue number three.

It its review of issue number four (4), "whether the Court erred in instructing the jury that Kinney pleaded that time was not of the essence," the Court of Appeals considered the position taken by Kinney at the trial along with the pleadings and concluded he was maintaining that time was not of the essence and even if the instructions complained of were incorrect, it was, at most, harmless error. Further the Court found that Kinney did not make a special request for clarification nor did he make any objection to the charge at the trial or at his Motion for a New Trial.

Therefore, Kotler asserts that all of the issues raised on appeal below are not substantial federal questions and were decided on adequate non-federal basis. Kotler again asserts that an Order to Dismiss is proper in this course.

Kotler further prays that the Court dismiss this appeal pursuant to 28 U.S.C. 1915 (d):

> "Proceedings in forma pauperis: The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

Kotler couples with this a reference to U.S. Supreme Court Rule 16.1 (d):

> "The Court will receive a Motion to Dismiss or Affirm on any other ground the Appellee wishes to present as a reason why the Court should not set the case for argument."

The underlying reason for 28 U.S.C. 1915 (d) is to prevent abuse of the Court system. See, Tyler v. Callahan (E.D. Mo.), 74 F.R.D. 421, aff'd without op. (C.A. Mo.) 573 F.2d 1313, cert den., 436 U.S. 947. Various tests for finding an appeal frivolous include "essentially equivalent to rediculous," "an action lacking in arguable merit," having no realistic chance of success," "lacking in substantiality", or "making no rational argument on the law or facts." See, 32 Am Jur 2d § 243. This action meets most if not all of these tests and Kotler here prays that this Court order this Appeal dismissed pursuant to 28 U.S.C. 1915 (d) and U.S. Supreme Court Rule 16.1 (d).

CONCLUSION

WHEREFORE, premises considered, Appellee Kotler prays that this Court dismiss this Appeal on the grounds that Appellant did not properly or timely raise substantial federal questions, that Appellant's issues raised below were resolved by the Court of Appeals, Western Section at Jackson and the Supreme

Court of Tennessee on adequate non-federal basis, and that the appeal is frivolous.

David E. Caywood

DAVID E. CAYWOOD,
PICARD, CAYWOOD, ARTHUR & TAYLOR
Attorneys for Appellee,
Kotler Exterminating Co., Inc.

CERTIFICATE OF SERVICE

I, David E. Caywood, do hereby certify that three copies of the foregoing Motion has been mailed, U.S. Mail, postage prepaid to Mr. John Kinney, 717 Spring Street, P.O. Box 11502, Memphis, Tenn. 38112, this the 13th day of August, 1982.

David E. Caywood

DAVID E. CAYWOOD